Education Committee #2
March 11, 2013
Worksession

MEMORANDUM

March 5, 2013

TO: Education Committee

FROM: Elaine Bonner-Tompkins, Senior Legislative Analyst
Office of Legislative Oversight

SUBJECT: **Dispute Resolution Practices and Trends - Follow up discussion on OLO Report 2012-3: Services for Students on the Autism Spectrum**

On January 23, 2012, the Education Committee held a worksession on OLO Report 2012-3. Councilmember Phil Andrews requested this study to improve the Council's understanding and oversight of County appropriations aimed at serving students with autism spectrum disorders. At this worksession, the Committee raised questions regarding dispute resolution trends within MCPS and the Superintendent offered to have MCPS staff return to the Committee to brief them on this topic.

The intent of the March 7th worksession is to address the Committee's questions and improve their understanding of dispute resolution and related trends within MCPS. Two MCPS representatives will present to the Committee (materials will be available during worksession) and address questions:

- Chris Richardson, Associate Superintendent, Office of Special Education and Student Services, and
- Gwen Mason, Director, Department of Special Education Programs.

Two individuals are also scheduled to offer remarks and address questions, particularly regarding the challenges that some parents face with the current dispute resolution process with MCPS:

- Julie Reiley, parent and member of MCCPTA Special Education Committee; and
- Karen Smith, special education attorney.

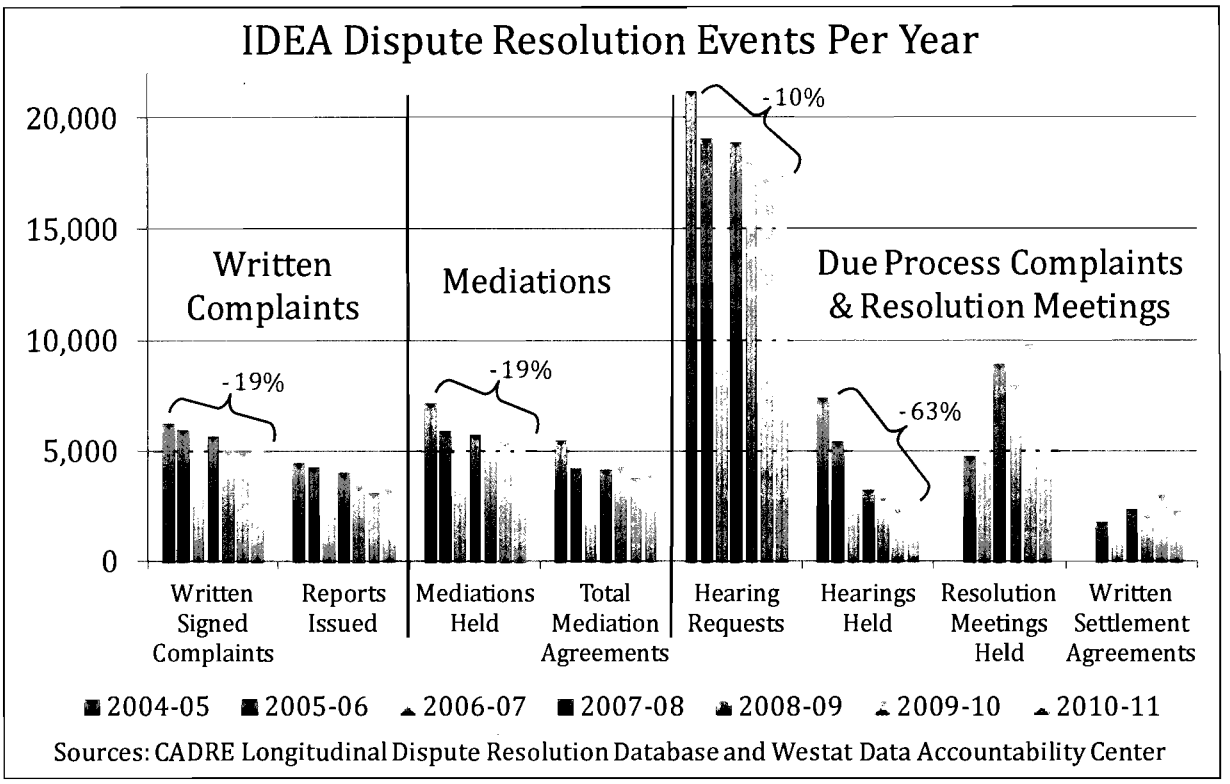
Finally, three MCPS staff will be in the audience and available to address questions from the Committee: Kimberly Statham, Deputy Superintendent; Zvi Geisman, Attorney, Legal Services; and Sharon Gooding, Supervisor for Equity Assurance and Compliance.

As background, the following items are attached:

Items	Begins at:
Trends in Dispute Resolution under the Individuals with Disabilities Education Act (IDEA), Center for Appropriate Dispute Resolution in Special Education (CADRE)	© 1
Fundamental Attributes of Exemplary State Special Education Dispute Resolution Systems, CADRE	© 2
Statement by Julie Reiley (parent) and copy of 2011 case referenced in statement	© 3
Statement by Karen Smith (attorney for children with disabilities)	© 24

Trends in Dispute Resolution under the Individuals with Disabilities Education Act (IDEA)

The IDEA requires states to offer formal processes to resolve conflicts arising between parents and schools. Use of the more adversarial processes, particularly *Due Process Complaints*, grew from the 1990s through 2005. Use of these formal processes has declined since and much of that decline results from the use of early, more collaborative approaches to resolve IDEA-related disputes between families and schools.



Trends in the use of IDEA Required Dispute Resolution Approaches Since 2004-05

- *Written Complaints* has declined by 19%, *Due Process Complaints* by 10%, and *Due Process Hearings Held* by 63%. These more adversarial practices often involve significant costs for parents and schools, as well as personal, emotional, and relationship damage.
- *Mediations Held* is down by 19%, primarily from less use of due process-related mediations.
- *Resolution Meetings Held* has changed little since 2006-07. Resolution Meetings are likely being used in lieu of mediation to address some *Due Process Complaint* issues. Agreement rates from *Resolution Meetings* are relatively low (19% to 24%).

Support for More Collaborative Dispute Resolution Approaches

- 20 states now support IEP facilitation activities in local districts; this is up from 8 states in 2005.
- At least half of the States now offer early, collaborative alternate dispute resolution activities (e.g., parent hotlines, IEP facilitation, ombudspersons, stakeholder training, advisory opinion).
- Some states support the use of facilitators in *Resolution Meetings*, resulting in much higher written settlement agreement rates from these meetings (41% to 70%).
- State use of more collaborative approaches is linked to less use of the formal processes, leading to considerable fiscal savings, increased system efficiencies, and improved relationships.

Center for Appropriate Dispute Resolution in Special Education
CADRE@directionservice.org
www.directionservice.org/cadre
541-686-5060

Fundamental Attributes of Exemplary State Special Education Dispute Resolution Systems

Between Fall 2008 and Summer 2010, CADRE analyzed state special education dispute resolution systems and their components, with the objective of identifying particularly effective systems and creating a resource that other states could draw on when considering improvement activities. Four states with exemplary systems and practices were identified (IA, OK, PA and WI), profiles were developed and a database of resources from these state systems was created. Analysis of common features across these systems identified a number of elements as being fundamental to their success, including the following:

- Oversight Guided by a Clear and Integrated Vision of the System
  - Management structure that includes a specific individual or group having responsibility and authority for coordination and performance of the system
  - Reliable financial and personnel resources adequate to support all system components
  - Transparency in the design, implementation, performance and evaluation of the system
  - Use of evaluation data to guide continuing system improvement efforts
  - Active and *meaningful* engagement of a broadly representative group of system stakeholders in planning, promotion, evaluation and improvement activities
- A Continuum of Dispute Resolution Options and Practices
  - Preventative or "upstream" dispute resolution approaches, including early informal assistance and resources, offering alternatives to due process and formal complaint procedures
  - A single "point of entry" for families, including personal assistance to provide information, help identify and resolve issues, or suggest an appropriate dispute resolution option
  - Educational materials comparing dispute resolution procedures and describing how to use them effectively
  - Information and training in collaborative strategies, including dispute prevention skills, available to educators and parents
- Standards, Training and Technical Assistance
  - Relevant experience, education and training requirements for each role and position in the dispute resolution system
  - Clearly articulated standards and guidance for performance, practice and expected results for all personnel
  - Continuing education and professional development opportunities that respond to identified dispute resolution and prevention training needs
  - Technical assistance at the state and local level that leads to improved performance in specific activities and in overall system functioning
- Public Awareness, Outreach and Stakeholder Involvement
  - Collaboration between SEA and stakeholder organizations (i.e., PTIs and CPRCs) to develop resources and ensure availability and distribution to the widest audience possible
  - Readily available documentation of the system's options and practices in publicly accessible formats
  - A wide range of outreach activities and methods of information dissemination including web, print, television/radio and in-person presentations in understandable language(s)
  - Continual recruitment of new stakeholders, as well as activities to keep experienced participants engaged, recognizing that the population of stakeholders is ever-changing
- Collection, Analysis and Reporting of Evaluation Data for Continuous Quality Improvement
  - Standards that incorporate benchmarks and assess against "best performance" measures
  - Mechanisms for data collection and tracking that provide systematic information about individual dispute resolution practices and practitioners, as well as the performance of the system as a whole
  - Procedures for assessing how well the standards, personnel guidance, training and technical assistance are achieving the organizational mission

JULIE REILEY
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Statement before the Montgomery County Council Education Committee on Dispute Resolution

March 7, 2013

Thank you very much for the opportunity to address the very important topic of dispute resolution. This is an issue that has impacted, or will impact, many parents of children with disabilities in MCPS, including myself.

My child has received special education services in Maryland for several years. Thus, for the past three years, I have been honored to serve as the PTA Special Needs Liaison at my son's school, where I have supported families and brought special needs assemblies and seminars to our students, parents, and teachers. In addition, I am a member of the MCCPTA Special Education Committee, and an active member of the special needs community.

First, and foremost, I am a parent, specifically, the parent of a child who receives special education services in MCPS. Over the years, my son has received some wonderful services. However, I have also encountered significant challenges along the way, challenges that lead me to advocate for a vital change in due process in Maryland. I am an active proponent of two bills introduced this session in the Maryland General Assembly, SB 691 and HB 1286. These bills would place the burden of proof on school districts in due process under the IDEA.

My Experience with IEP Meetings and Due Process

Based upon my own experiences, I see two problems that relate to dispute resolution: (1) parents are not consistently treated as equal members of the IEP team, and the school feels free to assume a bargaining or adversarial approach to creating an IEP; and (2) the district engages in aggressive tactics in due process.

When my son was in the Preschool Education Program (PEP), my husband and I arrived at an IEP annual review and were told, out-of-the-blue, that our son would be placed in a more restrictive setting. It was apparent to us that MCPS had made up its mind before the meeting, and we were not equal members of the team. At the end, after we had objected, the team leader announced, "It's settled. Everyone agrees. . . . oh, except the parents."

In that meeting we were told we could: (1) accept this placement; (2) refuse all services (meaning my son would lose all of his services); or (3) proceed to mediation / due process. Stunned, we chose mediation / due process. I was an attorney, so I represented my son.

The burdens preparing for the hearing, against a school district, were huge. I had to familiarize myself with federal and state law and procedures for hearings. I had to write a complaint, detailing how the district's actions failed to comply with the IDEA. I had to gather information and prepare witnesses.

In the face of all this, the district's attorney stated I was to communicate with him only. As a result, I was prohibited from speaking to my son's educators about his IEP. Then there were the denials. The district denied my request to observe the placement with my son's former TCAPP teacher (i.e., a former MCPS teacher), and claimed I was not entitled to that benefit in due process - even though I had never been before.

However, even if I had been before, denying any parent the right to observe the placement at the heart of the dispute with the person chosen to assist them (per the IDEA[1]), is a tactic aimed at preventing a parent from providing information to the hearing officer that directly bears on the appropriateness (or lack thereof) of the disputed placement. It is a win at all costs tactic. A cost born by a child and a family.

Likewise, MCPS also denied much of my document request under COMAR, including documents that would have shed light on MCPS's decision-making process (including any inappropriate considerations, of which is a parent's right to present evidence). This denial also covered instructional materials, necessary to understand (and explain to the hearing officer) the placement's curriculum (materials I had an independent right to inspect under the Family Educational Rights Privacy Act). Again, a tactic aimed at preventing a meaningful presentation of the relevant information to the hearing officer.

Each request I made was relevant and geared toward making a full and meaningful presentation to the hearing officer. Yet, MCPS denied much of them in a cookie cutter categorical response that they were either not relevant (they were) or that any other documents would be provided pursuant to MCPS's 5-day disclosure obligations. The 5-day disclosure rule requires that if a party wants to use a document at hearing, it must be disclosed to the other side. Thus, the denial was wrong because the disclosure rule in no way limits parents right to request documents pursuant to COMAR. I knew this, because I am an attorney. A parent without a law degree likely would not.

I was forced to file an emergency motion to compel to explain to the hearing officer why these denials violated my rights under the law.

In short, the district engaged in aggressive tactics aimed at making it impossible for me to meet my burden of proof and make a meaningful presentation to the hearing officer. As a parent and a former federal civil prosecutor, I take issue with any agency, but most especially with a school district, that engages in aggressive tactics against a pro se parent, and pursues an approach that places winning at all costs before a just outcome arrived at after a meaningful presentation of all the relevant information to the hearing officer. With this approach, it is inevitable IEPs that do not provide FAPE will not be remedied, and at what can be dire consequences to the child, and the child's family.

Tthe IDEA specifically allows parents to have non-attorney advocates or consultants throughout the process.

Fast forward a few years. It was two months into the school year, and I learned my son was receiving a small fraction of the resource hours his IEP required. When I met with the principal, he refused to comply with the IEP. He offered a larger fraction of the hours, and if I didn't take it, I could sue; I had due process. The thought of going through due process, of fighting for my son's rights again, plus having the burden of proof on top of it all, was too much. I caved in and accepted less than my son needed.

Why did the principal feel free to act the way he did? I had emailed MCPS staff in the Department of Special Education (but not Ms. Mason). The Equity Unit suggested I use a facilitator. Because I thought the facilitator would point to the IEP and tell the principal he had to implement it as written, I happily agreed. What I did not know at the time was that the facilitator would merely repeat back to me what the principal had said. In other words, it merely facilitated an IEP process by which MCPS, through, it's principal, used bargaining and the threat of forcing me to sue (during which time my son would still be getting the miniscule fraction of resource hours he was entitled to) to pressure me into renegotiating my son's IEP.

Ways MCPS Can Improve the Process

1. **Prohibit the kind of aggressive tactics it used.** In all due process cases, but especially against parents without attorneys with experience in special education law. Provide relevant documents as requested. Allow parents to observe placements as part of due process and mediation, and to bring with them the consultant they have, and have a right to, under IDEA (the IDEA specifically allows parents to have non-attorney advocates or consultants throughout the process).

2. **It should accept the burden of proof in all cases, or at least institute policy that prohibits it from winning cases without putting on any evidence.** MCPS can and has moved to win cases against pro se parents without putting on any evidence in the hearing. I have attached a copy of a 2011 case in which this happened. It seems wrong to me that the #1 school district in the #1 state for education should ever think it fit not to behind and explain any IEP or whatever decision it made that lead to due process.[2]

3. **Provide independent advocates for parents in IEP meetings** who will inform parents of their rights and stand up to the schools and prohibit bargaining and negotiations of a child's education and threats of due process as a tactic. This will give parents a greater voice and hopefully lead to fewer disputes and more collaboration.

4. **Training for principals in both the law, and to encourage a culture of cooperation not negotiation.** Based upon my experience and what I have seen in the special needs community, some principals seem to think the IEPs are fashioned around the resources that happen to be available at the time at the school, and not the child's individualized needs, as the IDEA requires.

[2] Several states have burden of proof laws (*e.g.*, New York, New Jersey, Nevada, and others, with some variations) or require parental consent to change an IEP (*e.g.*, California and Virginia).

XXXX XXXX,	*	BEFORE NICOLE PASTORE KLEIN,
III,	*	AN ADMINISTRATIVE LAW JUDGE
STUDENT	*	OF THE MARYLAND OFFICE
v.	*	OF ADMINISTRATIVE HEARINGS
MONTGOMERY COUNTY	*	OAH NO: MSDE-MONT-OT-11-02077
PUBLIC SCHOOLS	*	

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RULING ON MOTION FOR JUDGMENT

STATEMENT OF THE CASE

On January 14, 2011, XXXX XXXX (Parent), on behalf of her son, XXXX XXXX, III (Student), filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). On January 26, 2011, MCPS filed its response to the Parent's Complaint.

On February 11, 2011, MCPS advised the OAH that the Parent and MCPS had not resolved the dispute via a resolution session and, therefore, asked that a hearing be scheduled. On March 2, 2011, I conducted a telephonic pre-hearing conference (TPHC) in the above-

captioned matter. The following individuals participated: Jeffrey A. Krew, Esquire, attorney for MCPS, and Jonathan C. Silverman, Esquire, attorney for the Parent and Student. As the Parent filed the Complaint prior to retaining Mr. Silverman, and did not specifically delineate the hearing issues in the Complaint to be discussed at the TPHC, the parties agreed that the Parent could amend the Complaint solely for that purpose, on or before Monday, March 7, 2011.[1] On March 7, 2011, the Parent filed an Amended Complaint expressly delineating the hearing issue:

> [W]hether MCPS have violated a requirement of Part B of IDEA by not being able to provide a free appropriate public education [FAPE] to a student with a learning disability, and whether the Student should be placed in a private school because the public school option cannot accommodate the Student per the statute. In this Complaint, the Parent clearly stated the issue is that although an IEP [individualized education program] was developed for her child, the IEP has not been followed with specificity, and the school environment makes it impossible for the Student to succeed, even if the IEP were strictly adhered to by the school's staff.

During the TPHC, the parties were advised of the time requirements for issuing a decision. *See* Md. Code Ann., Educ. § 8-413(h) (2008) and 34 C.F.R. § 300.515(a) and (c) (2010). Forty-five days from February 11, 2011, the date MCPS notified the OAH of the outcome of the unsuccessful resolution session, was Monday, March 28, 2011. Due to counsels' other court schedules and significant scheduling conflicts, the parties were unavailable for three days of hearing (as was originally scheduled) until March 28, 2011 through March 30, 2011. After my review of their issues and calendars, the parties then suggested and mutually agreed to waive the time requirements set forth in 34 C.F.R. § 300.515 and Code of Maryland Regulations (COMAR) 13A.05.01.15C whereby my decision will be due no later than thirty days after the

[1] The parties further agreed to waive the necessity for an additional resolution session and any accordant date recalculations in association therewith. The parties acknowledged that MCPS could have filed a Motion to Dismiss the Complaint based on sufficiency, pursuant to 20 U.S.C. § 1415(b)(7)(A), but rather than do so and re-file the Complaint, the hearing issues were discussed at the TPHC as they had been briefed generally in the Complaint.

final day of hearing, on or before April 27, 2011.

On March 28, 2011, I convened a due process hearing at MCPS headquarters, 850 Hungerford Drive, Rockville, Maryland 20850. The Parent represented herself.[2] Mr. Krew represented MCPS. At the outset of the hearing, MCPS made a Motion to Dismiss the Parent's case based upon her failure to disclose a list of witnesses and exchange documents no later than five business days prior to the hearing, pursuant to the five-day disclosure rule set forth at 34 C.F.R. § 300.512 and the TPHC Order at p. 2, sections B and C.

On March 21, 2011, the parties were to exchange five-day disclosure statements. On March 21, 2011, MCPS complied; however, on that same day, MCPS received, via facsimile, a Line Striking Attorney Appearance from Mr. Silverman, the Parent's counsel. MCPS immediately contacted the Parent via email to remind her of the five-day mandatory disclosures. The Parent acknowledged the same and indicated that she would be proceeding in the matter without an attorney; however, she neither provided copies of the documents that she intended to introduce into evidence nor a list of witnesses whom she planned to call to testify at the administrative hearing.

I declined to dismiss the Parent's case based solely upon her failure to comply with the five-day disclosure rule set forth at 34 C.F.R. § 300.512 and the TPHC Order at p. 2, sections B and C. I did, however, at MCPS' request in the alternative and pursuant to 34 C.F.R. § 300.512(a)(3), prohibit the introduction of any evidence at the hearing that had not been disclosed to MCPS or that MCPS did not disclose to the Parent at least five business days prior

[2] Mr. Silverman withdrew his appearance on March 22, 2011. The Parent explained it was due to financial issues.

to the hearing. *See also* 20 U.S.C. § 1415(f)(2)(B); Md. Code Ann. Educ. § 8-413(f)(iii) (2008).[3]

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and COMAR 13A.05.01.15C.

At the close of the Parent's case, MCPS made a Motion for Judgment (Motion), to which the Parent responded. I did not expressly rule on the Motion, but held it sub curia. I informed the parties that I would issue a written ruling on the Motion within thirty days, April 27, 2011, and, at that point, reschedule the merits hearing if necessary.

The Administrative Procedure Act, the Maryland State Department of Education procedural regulations, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); COMAR 13A.05.01.15C; and COMAR 28.02.01.

ISSUE

The issue is whether MCPS' Motion should be granted.

SUMMARY OF THE EVIDENCE

Exhibits

The Parent did not introduce any documents to be admitted into evidence.[4]

[3] It should be noted that, at this juncture, the Parent stated that she did not intend to introduce any documents into evidence beyond what MCPS had provided in its five-day disclosure. She had only one witness other than herself, her sister, whom she wanted to testify but my ruling precluded her sister's testimony.

[4] The Parent stated on the record that she had no objection to any of MCPS' pre-marked exhibits and that they all could be referenced as Joint Exhibits, per the TPHC Order, p. 3 at Section G. With that being said, I explained to the Parent on at least two occasions that these documents (even though she "agreed" with them) were *not* in evidence; that she had the burden of proof in this case and, therefore, *if* she wanted to rely on any of them during her case-in-chief, *she* would need to formally introduce them into evidence. Although she referred to a few of these documents during the presentation of her case, she failed to request that any of them be admitted into evidence.

I admitted the following document on behalf of MCPS: [5]

MCPS Ex. 17 — March 8 and 9, 2011 email exchange between the Parent and XXXX XXXX, Special Education Teacher, MCPS

Testimony

The Parent testified on behalf of the Student. MCPS did not present any witnesses.

JOINT STIPULATIONS OF FACT[6]

1. The Student is fifteen years old, date of birth XXXX, 1995.

2. The Student has been found eligible for special education services under the disability coding of Other Health Impairment (OHI) due to a diagnosis of Attention Deficit Disorder (ADD), which is believed to affect his academic skills in the areas of reading, math and written language.

3. During the 2009-2010 school year, the Student attended the ninth grade at [School] ([School]). Pursuant to his IEP, which included instructional/testing accommodations and supplementary aids, services and program modifications/supports, the Student received 15 hours and 40 minutes a week (20 – 47 minute sessions) of special education classroom instruction within the general education setting. The Student attended general education classes for English, math and social studies, with special education support.

4. During the 2010-2011 school year, the Student is in the tenth grade and attends [School].

5. The Student's academic skills in the areas of reading, math and written language continue to be affected by ADD during the 2010-2011 school year.

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[5] Per the TPHC Order, p. 3 at Section G, MCPS had pre-marked its exhibits it intended to introduce into evidence at the hearing. In light of MCPS' Motion, it only sought to admit one exhibit into evidence during the Parent's cross-examination.

[6] Pursuant to the TPHC Order, p. 3 at Section F, the parties agreed to the following stipulations of fact.

6. During tenth grade, until December 23, 2010, pursuant to his IEP, which included instructional/testing accommodations and supplementary aids, services and program modifications/supports, the Student received 3 hours and 55 minutes a week (5 – 47 minute sessions) of special education classroom instruction outside the general education setting in a special education resource class and 15 hours and 40 minutes a week (20 – 47 minute sessions) of special education classroom instruction in the general education setting. The Student attended general education classes for English, math, science and social studies, with special education support.

7. On December 23, 2010, an IEP team meeting was convened to conduct a periodic review. Pursuant to this IEP, which included instructional/testing accommodations and supplementary aids, services and program modifications/supports, the Student is receiving 7 hours 50 minutes a week (10 – 47 minute sessions) of special education classroom instruction outside the general education setting in a special education resource class and 15 hours 40 minutes a week (20 – 47 minute sessions) of special education classroom instruction in the general education setting. The Student would attend general education classes for English, math, science and social studies with special education support and receive two periods of a special education resource class.

8. On January 11, 2011, an IEP team meeting was convened to discuss formal educational and psychological re-evaluations of the Student to determine: 1) his present levels of academic achievement and related developmental needs; 2) his special education and related services needs; and 3) whether any additions or modifications to his special education and related services are needed.

9. At the January 11, 2011 IEP team meeting, the Parent advised that she did not

want MCPS personnel to complete the re-evaluation testing as she was going to have the testing completed by the XXXX Medical Center. The Parent signed a consent for the appropriate MCPS personnel to review the private testing when it was completed.

10. On January 14, 2011, the Parent filed the Complaint.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. As of the date of the hearing, nearly three months after the last IEP team meeting, the Student's re-evaluation testing had not been completed. It is expected to be completed on or about April 29, 2011, at which time the Parent will provide the results for MCPS personnel to review. The last formal educational and psychological re-evaluations of the Student were conducted in 2008.

2. The Student is involved in at least two extracurricular activities during the 2010-2011 school year. He is currently an XXXX candidate, requiring his involvement of a half day to a full day per week, and has a role in the school play XXXX, with mandatory practice five days per week from 2:30 p.m. to 5:00 p.m.

3. On March 7, 2011, the Parent filed the Amended Complaint.

DISCUSSION

Burden of Proof

The Parent, as the party challenging the IEP for the 2010-2011 school year,[7] has the

[7] I have concluded that the Parent is challenging the 2010-2011 IEP (from December 23, 2010) in that her Amended Complaint states generally that the Student is currently not receiving a FAPE and, therefore, he should be placed in a private school. The Complaint, which has been incorporated in total by reference via the Amended Complaint, requests that the Student be placed in a private school setting immediately. At the hearing, however, the Parent requested that the Student be placed in a private school for the next two years of eleventh grade and twelfth grade. Accordingly, I will consider the Parent's request for private school placement during the Student's tenth grade year abandoned.

burden of proof. *Schaffer v. Weast,* 546 U.S. 49, 62 (2005). The Parent's burden is "by a preponderance of the evidence." Md. Code Ann., State Gov't § 10-217 (2009).

Applicable Law

The process of identification, assessment, and educational placement of students with disabilities is governed by the following federal and state laws and regulations: The IDEA, 20 U.S.C.A. §§ 1400-1482 (2010), 34 C.F.R. Part 300 (2010), Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2010), and COMAR 13A.05.01.[8] The IDEA provides that all children with disabilities have the right to a "free appropriate public education" (FAPE). 20 U.S.C.A. § 1412.

Title 20, Section 1401(9) of the United States Code defines FAPE:

> The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9). *See also* 34 C.F.R. § 300.17 (defining FAPE similarly); Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2010).

The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction.

Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). In *Rowley,* the Supreme Court explained a FAPE as follows:

> Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. ... We therefore conclude that the basic 'floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to give educational benefit to the handicapped child.

Rowley, 458 U.S. at 200-201.

Federal courts in this circuit have applied the principles articulated in *Rowley.* A student is not entitled to "[t]he best education, public or non-public, that money can buy" or "all services necessary" to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983). Rather, the issue is whether the IEP is reasonably calculated to enable the child to receive educational benefit, as demonstrated by such measures as passing marks and advancing from grade to grade. *Rowley,* 458 U.S. at 203-04.

Thus, the issue is not whether the IEP will enable the student to maximize his or her potential. The IDEA provides a "basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). It does not establish a "requirement to guarantee any particular outcome for the child." *King v. Bd. of Educ. of Allegany County*, 999 F. Supp. 750, 767 (D. Md. 1998). The Fourth Circuit has explained that the IDEA does not require local education agencies to "furnish[] every special service necessary to maximize each handicapped child's potential." *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

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[8] From this point forward, any references to: 20 U.S.C.A. §§ 1400-1487 are to those in the 2010 volume; to 34 C.F.R. Part 300 are to those in the 2010 volume; to Md. Code Ann., Educ. §§ 8-401 through 8-417 are to those in either the 2008 volume and/or the 2010 supplement.

The question of whether a student is receiving a FAPE has a procedural and a substantive component. In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. The Supreme Court noted that the first inquiry is whether a school district complied with the procedures set forth in IDEA. The second inquiry is whether the IEP, developed through the IDEA's procedures, was reasonably calculated to enable a student with disabilities to receive appropriate educational benefit. *Rowley,* 458 U.S. at 206-07. As the Parent raised no procedural issues, this Decision will focus solely on the second prong of a FAPE.

In addition to the IDEA's requirement that a disabled child receive some educational benefit, the child must be placed in the "least restrictive environment" to achieve a FAPE. *A.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004). This means that, ordinarily, disabled and non-disabled students should be educated in the same class. 20 U.S.C.A. § 1412(a)(5)(A). The removal of children with disabilities from the regular educational environment should occur only if the nature or severity of the disability is such that education in regular classes (with the use of supplemental aids and services) cannot be achieved satisfactorily. 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. § 300.114; COMAR 13A.05.01.10.

In this case, the Parent challenges MCPS' ability to strictly adhere to the accommodations/supplementary aids provided for in the Student's 2010-2011 IEP. Nevertheless, she claims that even if MCPS were to consistently follow his IEP, the Student still would be unable to receive a FAPE because of a 32-student inappropriate class size, bullying, to which her son is subjected, and the deprivation of MCPS to provide the latest technology-based instruction. In that regard, she contends that the Student requires a private school with more computerized instruction to address his ADD.

Motion for Judgment

At the end of the Parent's case, MCPS moved for judgment arguing that the Parent's evidence was insufficient to prove that MCPS violated State or federal special education laws. The Parent made a brief argument in response.

COMAR 28.02.01.12E governs motions for judgment:

> E. Motion for Judgment.
>
> (1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of any opposing party's case.
> (2) When a party moves for judgment at the close of the evidence offered by an opposing party, the judge may:
> (a) Proceed to determine the facts and to render judgment against an opposing party; or
> (b) Decline to render judgment until the close of all evidence.
> (3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

The OAH's procedural rule on a motion for judgment is almost identical to Md. Rule 3-519 (Motion for Judgment in the District Court) and Md. Rule 2-519 (Motion for Judgment in the circuit courts, as that rule applies to bench trials.) Discussion about these court rules is applicable by analogy. The rules permit a judge in a bench trial to decide such a matter on the sufficiency of the evidence or to find facts at the end of a plaintiff's (in this administrative matter, the Parent's) case. Niemeyer and Schuett, *Md. Rules Commentary*: 390 (2nd ed. 1992) (citing *Pahanish v. Western Trials, Inc.*, 69 Md. App. 342 (1986)). In such a case, an ALJ can properly grant the motion for insufficient evidence (evidence not produced to satisfy elements of proof in the administrative action) or, assuming that the Parent has offered some evidence to

satisfy the elements, an ALJ can take the next step in the analysis and grant the motion by deciding that evidence was produced to satisfy the elements, but that the evidence was not competent and probative.

Analysis

For the Parent to survive MCPS' Motion, she must have offered some competent and probative evidence to establish, at a minimum, the inadequacy of the IEP to provide special education and related services that were reasonably calculated to provide some educational benefit to the Student or MCPS' failure to implement the services in the IEP that are reasonably calculated to provide educational benefit.

The Parent did not do so; her evidence was woefully deficient. Although the Parent offered an exhibit, she failed to offer the Student's IEP for the 2010-2011 school year or any documents relevant to the Student's failure to obtain some educational benefit from his instruction. Furthermore, although the Parent offered testimony, she produced no witnesses who testified about: (i) the content of the Student's IEP for the 2010-2011 school year; (ii) the status of MCPS' implementation of the Student's IEP during the 2010-2011 school year; or (iii) the status of the Student's educational attainment during the 2010-2011 school year. Furthermore, the Parent did not produce any credible evidence that MCPS' current IEP would not provide a FAPE. Her case consisted essentially of her disagreement with MCPS' failure to purchase and utilize the latest technology, specifically as to computer-based instruction; an allegation, with no documentation, that her son was the victim of bullying; and her dismay over the Student's large class sizes.

The Parent testified that her son is a very bright and capable college-bound learning disabled tenth grade student who is enrolled in on-level courses at [School]. She noted that she believed the Student was supported adequately and given the appropriate accommodations during his elementary and middle school years and, as a result, he received middle school grades of As, Bs and Cs in his courses. However, she testified that upon entering the ninth grade at [School], the Student's grades consisted mainly of Cs, with Ds received in Spanish, Geometry and Earth Science. Currently, in the tenth grade, the Student has a cumulative grade point average (GPA) of 2.52, which is down from his cumulative GPA in the ninth grade of 2.71. None of the Student's report cards, or even work samples, were presented. She also maintained that [School]'s special education department took on a less than supportive approach towards her son's special education needs as most of his teachers did not properly and consistently apply his documented learning accommodations. None of the Student's teachers at [School] were called to testify about their inability or their inconsistency in applying the Student's IEP. Additionally, the Parent alleged that the Student is not being educated in the learning environment that would be most beneficial to him—"small class size, high levels of structure and an ability to individualize the curriculum to work with learning differences—" as documented by Dr. XXXX XXXX, Neuropsychologist at XXXX Medical Center, on August 8, 2008. Dr. XXXX did not testify and the August 8, 2008 report was not submitted into evidence.

I do not doubt that the Student has academic problems and that the Student's grades have suffered. I also accept the Parent's testimony that in 2008, a treating psychiatrist recommended a "small class size, high levels of structure and an ability to individualize the curriculum to work

with learning differences." This recommendation does not establish, however, that the current IEP failed to provide a FAPE. Additionally, there was no evidence presented defining what "small class size, high levels of structure and an ability to individualize the curriculum to work with learning differences" specifically means for the Student.

In addition to the absence of probative affirmative evidence that the current IEP was not appropriate, the Parent made important concessions on cross-examination. She acknowledged that the Student was engaged in extracurricular activities during the school week that took up a great deal of time, i.e., XXXX and XXXXs, which was conflicting with the Student's after-school tutoring time. In an email to one of his teacher's the Parent stated that "This is something that [the Student] is learning about too: the work/life balance." *See* MCPS Ex. 17. Indeed, these activities could very well be taking away from the Student's studies and educational focus, thereby affecting his high school GPA. Furthermore, one of three subject areas that the Parent complained—geometry—she recently lauded the class. In an email to the general education teacher, the Parent stated that, "I enjoyed coming to your class this morning to observe your class this morning with Ms. XXXX [special education teacher]. The way you run your class was wonderful. You and Ms. XXXX did an excellent job in managing a rather large geometry class. Thanks for your intervention to keep him on the right track in geometry." *Id.*, March 9, 2011 email.

Moreover, the Parent admitted that as of the date of the hearing, nearly three months after the last IEP team meeting, the Student's re-evaluation testing still had not been completed and was not expected to be completed for at least another month. With that admission, I cannot find that MCPS was and/or is required to do more with the Student's IEP beyond what it is currently doing. Indeed, MCPS already engaged in a mid-school year meeting, on December 23, 2010,

and re-worked the IEP in an attempt to account for the Student's falling grades. Furthermore, in the beginning of March 2011, [School]'s special education teacher reached out to the Parent, complaining that the Student did not have adequate study time or time with his tutor because of his extra curricular activity involvement, which took up ample time during the week, nearly three hours per day. *See* MCPS Ex. 17. In response, the Parent replied to the Student's teacher that work comes first. However, at the hearing, she testified that the school play (the extra curricular activity taking up approximately fifteen hours during the school week) was giving the Student such a sense of confidence that "she did not want to break his heart and take it away from him." While I recognize the importance of character building and of gaining responsibility associated with this after school activity, the problem is that the Student told his teacher that with this commitment, he did not have time for his studies. *Id.* A Student's failure to devote sufficient time to the educational component of school does not equate to a failure of the IEP.

Viewing the facts and reasonable inferences in the light most favorable to the non-moving party, I determine that the Parent failed to produce sufficient evidence regarding MCPS' inability to properly implement the Student's IEP. Moreover, there is no IEP in evidence. The Parent presented no material facts suggesting the IEP cannot be implemented at [School] or that it is not the appropriate placement. The Parent's opening statement and argument reflected her concern for the security of her child; yet, there was no corroborating evidence to conclude that her son was, in fact, the victim of bullying which, in turn, interfered with the Student's ability to receive meaningful educational benefit. I recognize this is a genuine and important concern, but it is not one that raises legal issues cognizable under the IDEA.

With regard to the appropriate placement—the need for "a private school", the Parent testified that the Student needs a smaller class size and computer-based learning tools. She

presented no evidence, however, to this effect. She merely stated that in her opinion when "you see a student's grades begin to decrease, red flags should go off and the IEP should be reworked to individualize it and make it better for the student." Indeed, that is precisely what MCPS attempted to do with the Student; it convened an IEP team meeting on January 11, 2011 to discuss re-examining his IEP by conducting formal educational and psychological re-evaluations of the Student. Since the last evaluations were performed in 2008, the IEP team agreed that new evaluations were needed to determine: 1) his present levels of academic achievement and related developmental needs; 2) his special education and related services needs; and 3) whether any additions or modifications to his special education and related services are needed. At the meeting, MCPS attempted to schedule the re-evaluation; however, the Parent rejected MCPS' offer to perform the re-evaluation testing because she was not satisfied with MCPS' findings after her son's testing was conducted in elementary school. She explained that she placed more value in the findings of a neuropsychologist than with MCPS' professionals. The problem with that, however, is that the testing has yet to be performed, making it impossible for MCPS to rework the Student's IEP beyond what it already has accomplished.

I do not doubt that the Parent's concerns for her son are sincere. With regard to the provision of a FAPE, however, she has produced no evidence other than her own unsupported opinion that MCPS has not complied with applicable law. The Parent failed to offer any testimony from a special educator, or even a general educator, to address this

issue.[9] Based on the lack of evidence from which I could reasonably find material facts to support the Parent's allegation that MCPS failed to provide a FAPE during the 2010-2011 school year, I conclude that the Parent failed to satisfy her burden of production or persuasion in this case. 20 U.S.C.A. § 1412; *Schaffer v. Weast,* 546 U.S. 49, 62 (2005).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

A. The Parent has failed to satisfy her burden to offer any evidence that creates a legitimate dispute about whether MCPS has failed to provide a FAPE to the Student and whether the Student should be placed in a private school. 20 U.S.C.A. § 1412 (2010); *Schaffer v. Weast,* 546 U.S. 49 (2005); and

B. MCPS is entitled to a judgment against the Parent. COMAR 28.02.01.12E.

ORDER

I **ORDER** that MCPS' Motion for Judgment be, and it is hereby, **GRANTED**; and I further

[9] Without any expert testimony or other reliable evidence from the Parent, I note that the Fourth Circuit has been steadfast as to the weight of lay opinions in deciding whether the Student's IEP for the 2010-2011 school year was reasonably calculated to enable the Student to receive some educational benefit. *See, e.g., A.B.*, 354 F.3d at 328 (the "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parent."); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991) (IDEA mandates that it "leave[] the substance and the details of [the proper education for a disabled child] to state and local school officials"); *MM v. School District of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002) (a reviewing authority, i.e. the ALJ, has always been bound and should continue to be reluctant to second-guess professional educators).

ORDER that the Parent's Complaint and Amended Complaint be, and is hereby,

DISMISSED.

April 8, 2011
Date Decision Mailed

Nicole Pastore Klein
Administrative Law Judge

NPK

REVIEW RIGHTS

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the student resides. Md. Code Ann., Educ. §8-413(j) (2008).

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

The Office of Administrative Hearings is not a party to any review process.

Special Education Due Process in MCPS

Karen S. Smith
Attorney for children with disabilities
March 2013

It is important to remember that people never come to see me unless they are dissatisfied with some aspect of the educational services their children are receiving from the public schools. It is in the nature of my job that I seldom hear from people who feel that their children with disabilities are being well-served by MCPS. In the course of my work, I have seen school administrators put interventions in place that have almost literally saved a child's life; I have also seen heroic and amazing teachers advocate for kids with disabilities, only to be punished for having disagreed with "the party line" as dictated by a very different kind of administrator. In other words, MCPS is not a monolithic or uncomplicated institution. Still, some patterns emerge in the operation of MCPS's special education due process that are, as a whole, troubling.

Sometimes the people who come to me for help do not know what the options are for resolving differences with MCPS staff; more often, they have already tried to resolve identified differences of opinion and feel that their concerns have been brushed aside. Too frequently, they believe that they have been misled by school staff or worse yet, lied to about their child or about what is possible or available within the school system (sometimes this is true, and sometimes it's a question of perspective). Too frequently, parents have been told things with certainty and finality that are neither (e.g., their child cannot be given services in their home school because "We only have a half-time aide available at this school" – which amounts to a denial of services due to budget concerns, that is illegal under the IDEA (Individuals with Disabilities Education Act)). Nearly always, parents are at an extreme disadvantage in any dispute in this area, both in terms of information and resources (see discussion below regarding the burden of proof legislation currently pending in Annapolis).

Pete Wright, one the premier special education lawyers in the country,[1] is fond of saying that a special education case is like a combination of a medical malpractice case and a divorce case with children. It is like a medical malpractice case because of the highly technical nature of the disabilities involved, and it is like a divorce case with children, because:

1) both parties feel betrayed; and
2) the parties have to continue working together for the benefit of the children.

The parents feel betrayed that the school system is not actually teaching their child, and may in fact be harming their child. School staff feel betrayed that parents are questioning their professional competence. Neither party can truly walk away from the other until the child graduates from high school or turns 21 (unless the parents have a moderate amount of money – or a great deal of money, depending on the nature of the child's disability). Pete's point is that **it is a given that resolving disputes in special education will be technically complex and emotionally fraught.**

Against these dynamics, MCPS's zero-sum-game attitude towards parents in special education due process, which kicks in with a vengeance as soon as the matter is referred to outside counsel, creates unnecessary bitterness and wastes taxpayer money.

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[1] Pete Wright is also one of the founders of the Wrightslaw website (www.wrightslaw.com), an invaluable reference site for anyone wanting to learn more about the world of special education law and advocacy.

First, the way the contract is structured, outside counsel has absolutely no incentive to try to settle due process cases, or even to narrow the issues for trial, as outside counsel does not get paid for any pre-hearing preparation. Not only does this speak to a lack of cost/benefit analysis[2] for these cases, it also dictates that counsel routinely relies on a few stock defenses. These defenses consist primarily of blaming the parents for: 1) neglecting their parental duties; 2) deliberately undermining the school's proposed program; 3) failing to recognize how defective (and therefore how ineducable) their children actually are; and 4) getting upset at school staff who explain items 1, 2, and/or 3 to them. Outside counsel is paid per day of hearing only ($6,000 per day; $3,000 just to show up and tell the ALJ that the case has settled). This also gives outside counsel incentive to draw out the hearings to be as long as possible, which again, runs up the taxpayer's bill unnecessarily.

Second, outside counsel is clearly told to "take no prisoners" in the conduct of the trial. Much as an ethical prosecutor for the state pursues justice over victory, so an attorney for the school system ought to pursue educational benefit over victory. Ordinarily, as counsel learns more about a case (either in proper pre-hearing preparation or in the course of taking testimony), information comes to light that makes it reasonable to settle some or all of the issues in dispute. This rarely, if ever, happens in MCPS special education due process cases, as the particular outside counsel who has held this contract year after year is habitually unreasonable, personally irascible, and inclined to accuse parents' counsel of unethical behavior on the slimmest of pretexts.

Third, this unnecessarily adversarial attitude hardens parents who are already feeling betrayed by the system into implacable enemies of MCPS. Any inability to make progress with a child is routinely blamed on the child and his or her parents, with a level of personal attacks that is utterly unnecessary. In a recent case, a teacher had lost her job with MCPS because she asked for too much time off to attend to her disabled child; at a subsequent due process hearing, she was portrayed as a mom who was seeking residential services for her child solely to avoid her own parental responsibilities. In many cases, reports from parents about statements made by outside counsel at due process hearings are discounted by the rephrasing statement, "You mean, the attorney said this – not an MCPS employee, right?" MCPS seems to want to pretend that the behavior of outside counsel during due process somehow has nothing to do with them: this disingenuous and irresponsible. Due process does not have to be conducted in this manner.[3]

To be fair, in passing the Education of Handicapped Children Act (later renamed IDEA) in 1975, Congress fundamentally changed the mission of the public schools, and our school systems, including MCPS, have yet to truly take that changed mission to heart. We continue to refer to the "accommodation" of learning differences, and to the "specialized

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[2] If any cost/benefit analysis is performed prior to sending a matter to outside counsel, that effort is completely hidden from view. In an illustrative recent case, MCPS spent $12,000 in outside legal fees to contest a parent's request for an IEE (independent educational evaluation) that would have cost the school system $2,500.

[3] MCPS, which likes to imagine itself an educational leader, spent 12 years under Jerry Weast dismantling options along the special education services continuum, and Weast's hardball tactics against the parents of kids with disabilities appear to have continued under Starr.

instruction" needed by students with IEPs. We talk about schools striving to teach children in such a way as to maximize their potential – unless that child has a disability. Then suddenly, "maximizing potential" is something we can't even talk about.[4] This institutional hard-line attitude against IDEA's fundamental change in the mission of the public schools is a real barrier to reform in this area.

MCPS staff opposition to changing the burden of proof is illustrative of this unproductive frame of mind. MCPS legislative staff has made several arguments against changing the burden of proof. These arguments point to the "long-standing tradition" of the party seeking relief bearing the burden of proof in civil court, to which the Supreme Court analogized special education due process in *Schaffer v. Weast*.[5] These arguments then hypothesize that changing the burden of proof in special education due process will necessarily result in a presumption that all IEPs are "invalid." Without citation to any facts or data from other states that have made this change, this analysis then leaps to the conclusion that changing the burden of proof will cause more people to file due process requests. None of these arguments hold water.

First: as to whether this change will cause more due process requests to be filed: this has not been the experience of New York and New Jersey, two states that have made this change since *Schaffer v. Weast* was handed down. In New Jersey, *fewer* requests for due process were filed after the change in burden of proof, *not* more. In New York, the *number* of requests filed remained the same, but more due process cases *settled* without a full hearing. In other words, requiring school administrators to defend the IEPs they had written apparently *decreased* the adversarial tone of IEP meetings and *increased* collaboration between parents and schools (this is consistent with anecdotal reports from parents and teachers in those states).

Second, there is no such thing as an "invalid" IEP. IEPs are either appropriate or inappropriate, and this change would not alter this fundamental aspect of IDEA jurisprudence. Right now, parents carry the burden of having to show that the school's IEP is inappropriate; this change would mean that schools would have to show that their IEP is appropriate. Changing the burden of proof would not change the definition of "appropriate" one iota, nor would it add to the list of issues about which parents can legally sue. Claims to the contrary are simply untrue.

Third, analogizing special education due process to civil cases involving plaintiffs and defendants, as the Supreme Court did in *Schaffer v. Weast*, is not an apt comparison. Because of the extreme imbalance of power and resources, special education due process is actually more akin to criminal process, where the power of the state bears down on an individual, than to civil process, where plaintiffs and defendants are presumed to be

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[4] *Bd. of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) (explicitly overturning a lower court decision that IDEA requires that a disabled child's educational potential be maximized in favor of a standard guaranteeing only that "some educational benefit" be provided by the school's program).

[5] *Schaffer v. Weast*, 546 U.S. 49 (2005) (establishing that the burden of proof in special education due process cases will, in the absence of state law to the contrary, be borne by the moving party – which is most often the parent).

roughly equal in power and resources. Shifting the burden of proof back to school systems will encourage the kind of ethical behavior in which attorneys for MCPS seek good educational outcomes (not merely victory over parents). This kind of ethical legal representation would better reflect why most people within MCPS went into the field of education in the first place.

Let me explain what I mean by "an extreme imbalance of power and resources."

Schools write the IEPs (nothing goes into an IEP of which the school does not approve), control the records, create the educational venues and services, employ the witnesses they are likely to call at due process, and never show up at a hearing unrepresented by counsel. Parents "offer input" into IEPs, "request" the records, "inquire" about educational venues and services, and then mortgage their houses to pay for witnesses with the expertise needed in due process, not to mention legal expenses (which are only reimbursed if the parent wins, and then reluctantly and not at full value – parents still have to front the money just to get their day in court). On top of all of this, schools (including MCPS) routinely argue that their decisions are entitled to deference (which frequently amounts to an argument for infallibility) – and they usually get it, from judges who have for years been trained nearly exclusively by school-side attorneys. This is nothing like a fair fight. Parents carrying the burden of proof in due process is just the cherry on top.

Changing the burden of proof is *not* a call for the public funding of parent-brought due process, but is instead a measure designed to restore a little balance to a situation that is overwhelmingly tilted in favor of school systems. This fix is designed to push the resolution of differences of opinions about the education of students with disabilities out of the courtroom and back into IEP meetings, where those differences can best be resolved. The experience of New York and New Jersey[6] indicates that this is exactly what happens when the burden of proof is shifted in special education due process, which is good news for everyone, because resolving issues in IEP meetings lowers costs and improves results.

[6] New York and New Jersey were (and are) the two most litigious states in the union as measured by the number of due process hearing requests filed per special education student.